

## **2015 West Virginia Health Care Privacy Regulations and HIPAA Preemption Analysis**

This chart provides an overview of the West Virginia health care privacy related regulations and an analysis of the preemption issues arising under the Privacy, Security, Breach Notification, and Enforcement Rules (45 C.F.R Parts 160, 162, and 164) of the Health Insurance Portability and Accountability Act of 1996, as amended by and including the regulations issued by the Department of Health and Human Services by the Health Information Technology for Economic and Clinical Health Act, Subtitle D- Privacy (§§ 13400 – 13424) (HIPAA). To assist healthcare providers and other entities in the complicated task of determining whether West Virginia state regulations have been preempted by HIPAA. This legal advisory chart was a new addition to the 2014 preemption analysis of applicable West Virginia state law provisions which appear to implicate HIPAA; therefore this chart will be updated with applicable West Virginia state regulations on a going forward basis as they are implemented by the legislature. Please note that this is not a comprehensive list of all applicable West Virginia regulations which may implicate a HIPAA analysis.

This survey is in a matrix consisting of seven columns. The first column is a general reference to the subject matter of the regulation. The second column is the specific West Virginia Code of State Rules citation or citations, which include embedded links to the complete regulatory language located on the West Virginia Secretary of State's website. The third column discusses the impact of each state regulation upon the privacy or security of protected health information as defined in HIPAA. In the fourth column is the corresponding HIPAA citation. The fifth column states whether HIPAA has preempted this state regulation. If the answer is yes, the extent to which the state regulation is preempted is sometimes described in the "Comments" column, along with other general comments regarding the law. The sixth column indicates whether the state regulation is more stringent or more detailed or whether HIPAA is more stringent.

Covered entities, as defined under HIPAA, should generally follow the law that is more stringent, but may have to comply with both laws in some cases. Where the remark is "Both" in the sixth column, the comments describe which part of the state regulation is more stringent or HIPAA is more stringent. Finally, the last column provides any commentary relevant to this analysis of the state regulation. However, the assessment of whether a state regulation is preempted or not is only a guide and any final determination on whether such state regulation is preempted would have to be the result of court action or decision.

This preemption analysis chart is a working document that is subject to review and revision. All individuals and entities that review this document are encouraged to provide feedback and omitted regulations to Sallie H. Milam, Chief Privacy Officer for the West Virginia Executive Branch, West Virginia Health Care Authority at: [SMilam@hcawv.org](mailto:SMilam@hcawv.org).

In addition to the preemption chart below, other useful information and links related to HIPAA and health care privacy and security can be found at the following:

1. West Virginia State Privacy Office: <http://www.privacy.wv.gov>
2. U.S. Department of Health and Human Services (HHS), Office for Civil Rights, Health

Information Privacy: <http://www.hhs.gov/ocr/privacy/index.html>

3. The Office of the National Coordinator for Health Information Technology:  
<http://www.healthit.gov/providers-professionals/ehr-privacy-security>

Last Updated by Jackson Kelly PLLC: August 31, 2015.

SUBJECT	WV CSR	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
Behavioral Health Patient Rights Rule	64 C.S.R. 59	Establishes the rights of clients of state operated behavioral health facilities; also sets forth standards for the confidentiality of client records and the disclosure of client records in the following circumstances: 11.2.1(a) in a proceeding under W. Va. Code § 27-5-4 to disclose the results of an involuntary examination made pursuant to W. Va. Code § 27-5-2 or W. Va. Code § 27-5-3; (b) in a proceeding under W. Va. Code § 27-6A-1, <i>et seq.</i> to disclose the results of an involuntary examination made pursuant thereto; (c) pursuant to an order of any court; (d) to protect against a clear and substantial danger of imminent injury by a client to himself or herself or another; and (e) for treatment or internal review purposes to staff of the behavioral health facility.	164.512(a) 164.512(c)	No	State Law	
Health Information Network-Uses and Disclosures	65 W. Va. C.S.R. 28 § 65-28-1 <i>et seq.</i>	Permits access to network only to designated authorized users within participating organizations; identifies an inquiry by a participating organization for a permitted purpose or a point-to-point disclosure between two participating organizations as the only two types of protected health information transactions; requires that either type of transaction designate the permissible purpose of the disclosure and use; forbids the Network from selling protected	164.506 164.508 164.510 164.512(a)-(k) 160.203(b)	No	Both	W. Va. Code § 16-29G-8 requires compliance with both state confidentiality laws and HIPAA.

Last updated by Jackson Kelly PLLC: August 31, 2015

\*\*This compilation of West Virginia regulations was started in 2014, and will be updated annually on a going-forward basis. This is not a comprehensive list of State regulations.

SUBJECT	WV CSR	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
		health information to third parties without authorization from the affected party; requires patients to be provided with the option to opt-out of the Network; even when opted out the Network will still disclose protected health information to state or federal agencies for public health reporting.				
State Board of Examiners for Licensed Practical Nurses	W. Va. C.S.R. § 10-2-14.2.e	When the Board reviews medical records during a complaint or investigation for licensing, all patient identifying information must be removed or redacted prior to introduction as evidence.	164.512(d)	No	Both	
State Board of Examiners or Speech-Language Pathology and Audiology	W. Va. C.S.R. § 29-1.15.4.j § 29-5-2.4.b.9	Prohibits individuals from revealing professional or personal information about the person served professionally; exceptions include when authorized by individual, when required to do so by law, or unless doing so is necessary to protect the welfare of the person or the community; mandates telepractice providers comply with all laws, rules, and regulations governing maintenance of patient/client records and confidentiality requirements.	160.203 164.512(a), (b), (c)	No	Both	Rule requires compliance with both state confidentiality laws and HIPAA.
Medical Examiner – Pronouncement, Investigation, Certification of Deaths, and Autopsy Reports	W. Va. C.S.R. § 64-84-8.2 § 64-84-19.2	Permits the Office of the Chief Medical Examiner and the County Medical Examiner to obtain and review medical records of the deceased to identify the body or when review of medical records may help determine the cause of death or answer material questions during an	164.512(g)	No	Both	

Last updated by Jackson Kelly PLLC: August 31, 2015

\*\*This compilation of West Virginia regulations was started in 2014, and will be updated annually on a going-forward basis. This is not a comprehensive list of State regulations.

SUBJECT	WV CSR	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
		investigation; original medical records may not be incorporated into the medical examiner's file; copies of medical records may only become part of the file at the discretion of the prosecutor and may not be released upon any request or subpoena; copies not maintained in the final medical examiner file shall be returned to the original institution or destroyed at the time the case is closed; autopsy reports shall not include medical records of the deceased.				
Health Promotion and Disease Prevention	W. Va. C.S.R. § 64-7-6  W.Va. C.S.R. § 165-51-4.23	Requires health care providers to report administration of vaccines through the West Virginia Statewide Immunization Information System (WVSIIS). All of the data in WVSIIS is confidential and exempt from disclosure except for limited disclosure related to the purpose of delivering medical or immunization services, investigating or managing an outbreak of a reportable disease, or determining if children enrolled in school have all required immunizations.	160.203(c) 164.512(a), (b)	No	State law	
Fatality and Mortality Review Team	W. Va. C.S.R. § 64-29-7.4 § 64-29-14 § 64-29-15	Creates four Fatality and Mortality Review Teams (FMRT) and related Review Panels. Requires all Review Panel members to sign a sworn statement promising to maintain the confidentiality of information, records, discussions, and opinions disclosed during reviews. Grants Review Panels the authority to call	160.203(c) 164.512(a), (b), (c), (f), (g)	No	State law	

Last updated by Jackson Kelly PLLC: August 31, 2015

\*\*This compilation of West Virginia regulations was started in 2014, and will be updated annually on a going-forward basis. This is not a comprehensive list of State regulations.

SUBJECT	WV CSR	EFFECT ON PROTECTED HEALTH INFORMATION	HIPAA CITES	PREEMPTED	HIPAA OR STATE MORE STRINGENT	COMMENTS
		<p>for an immediate review of medical records requested from physicians and hospitals treating the person whose death is under review. Requires health care providers to supply records for evaluation and review purposes only regarding the death of the person whose death is under review. Patient, hospital, and medical practitioner names are removed following nationally recommended guidelines and process to ensure confidentiality. No identifying information will be released in the annual report. All information, records, and opinions expressed by members are confidential and are not to be released or disclosed, not subject to discovery, subpoena, or introduction into evidence in any civil or criminal proceedings. Members of the FMRT and each of the Advisory Panels may not be questioned in any civil or criminal proceeding regarding information presented in or opinions formed as a result of a meeting of the panel.</p>				